**Githinji v Waiguru (Miscellaneous Civil Application E773 of 2023)**
**[2024] KEHC 8713 (KLR) (Civ) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8713 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E773 OF 2023**

**CW MEOLI, J**

**JULY 8, 2024**

**BETWEEN**

**DOUGLAS KIBUGI GITHINJI ..... APPLICANT**

**AND**

**VICTORIA NJOKI WAIGURU ..... RESPONDENT**

**RULING**

1. For determination is the motion dated 04.09.2023 by Douglas Kibugi Githinji (hereafter the Applicant) seeking *inter alia* that leave be granted to the Applicant to appeal out of time against the ruling of the Honorable Court in Nairobi Milimani Civil Suit No. E12840 of 2021 and all consequential orders thereto; and that the Honorable Court be pleased to issue a temporary stay of execution of the ruling delivered in Nairobi Milimani Civil Suit No. E12840 of 2021 (hereafter the lower Court suit) pending hearing and determination of the substantive appeal. The motion is expressed to be brought under Section 1A, 1B, 3A & 79G of the *Civil Procedure Act* (CPA), Order 50 Rule 5 & 6 and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) and is premised on the grounds thereon as amplified in the supporting affidavit sworn by Applicant.

2. The gist of his depositions is that on 24.03.2023 the lower Court delivered a ruling dismissing his motion dated 22.12.2022 which sought to stay the exparte orders issued on the latter date. He goes on to state that the orders sought to be stayed pertained to proceedings before the lower Court and that he only came to learn of the ruling and subsequent order dismissing his application, upon the same being served on his advocate on 19.06.2023. He asserts that he was under the mistaken belief that the matter was still pending ruling before the lower Court given that the matter had been deferred severally meanwhile on follow up with his counsel, he was informed that the file was in chambers. That neither party was aware of the ruling and order of the Court despite the same having been delivered on 24.03.2023 whereas Victoria Njoki Waiguru (hereafter the Respondent) only extracted and caused

the order to be served on 19.06.2023. He says he is aggrieved by the said ruling which essentially condemned him unheard.

3. He further deposes that failure to put in a response to motion in the lower court due to the mistaken belief that the matter was still pending ruling and the delay was inadvertent, unintentional and informed by an honest mistake. That the Respondent has threatened contempt proceedings which would be prejudicial, the sum ordered to be deposited by him being substantial in the harsh economic environment. He further asserts to being the primary provider for his infant family compounding and that his appeal is highly meritorious. Moreover that his counsel has already requested for certified copies of proceedings of the lower Court for purposes of the intended appeal. In summation, he deposes that it is in the interest of justice that the motion is allowed whereas no prejudice will be meted on the Respondent on accord of the former.

4. The Respondent opposes the motion through a lengthy replying affidavit dated 11.12.2023. She begins by stating that she initially moved the lower Court seeking an order that the Applicant deposits with the Court the amount of Kshs. 2,135,000/- being a sum advanced as credit to the Applicant, which order was granted by the lower Court. That aggrieved by the latter order the Applicant moved the Court seeking to vary and or set it aside but his motion was disallowed and previous order sustained. She goes on to state the Applicant thereafter moved this Court by the instant motion and simultaneously filed a similar motion before the lower Court dated 25.09.2023. In her view, the instant motion is frivolous, vexatious and a clear abuse of the Court process being contrary to the provisions of Section 6 of the *CPA*.

5. She further takes issue with the motion by deposing that the Applicant has failed to demonstrate that he has an arguable appeal by evincing a draft memorandum of appeal or the certified copy of the decision sought to be appealed. All contrary to the provisions of Order 42 Rule 2 of the *CPR*. That the Applicant has equally failed to demonstrate the substantial loss that may be occasioned should an order of stay of not be granted and besides, the Applicant is obligated to offer security. She goes on to assert inordinate delay of over five (5) months since the impugned ruling for which no explanation has been offered. And asserting that the motion is an attempt to thwart her enjoyment of the fruits of successful litigation. Finally, she deposes that the instant motion is an affront to the principle of res-judicata and *sub-judice* , and urges the Court ought not exercise its discretion in favour of the Applicant.

6. Despite directions given for the filing of submissions neither party complied.

7. The Court has considered the rival affidavit material in respect of the motion. Alongside the prayer for leave to appeal out of time, the Applicant has sought stay of execution pending hearing and determination of the intended appeal. However, before delving into the merits of the motion, it is well to address the *sub judice* and *res judicata* plea raised by the Respondent, based on Section 6 and 7 of the *Civil Procedure Act*.

8. A challenge to the Court's jurisdiction to entertain proceedings is a preliminary matter of law. The famous rendition on the point by Nyarangi. JA (as he then was) in the locus classicus case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, needs no restatement here.

9. The *sub judice* doctrine is codified in Sections 6 the *Civil Procedure Act* which provides that: -

> " No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under

the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

10. The foregoing provision was considered by the Supreme Court in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR as follows: -

> " The term '*sub-judice*' is defined in *Black's Law Dictionary 9th Edition* as: "Before the Court or Judge for determination." The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res *sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

11. Similarly *res judicata*, is codified in Sections 7 the *Civil Procedure Act*, which provides that: -

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

12. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, addressing itself to foregoing provision, stated that; -

> " *res judicata* is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010.
>
> .....
>
> Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

13. As earlier observed, the motion before this Court dated 04.09.2023 predominantly seeks leave to appeal out of time against the decision of the lower Court and an order of temporary stay of execution of the lower Court decision pending hearing and determination of the intended appeal. The Respondent through his affidavit in reply at paragraph 8 has assailed the instant motion as *sub judice* by dint of the fact that subsequent to filing the motion before this Court, the Applicant proceeded to file a motion before the lower Court dated 25.09.2023 seeking more of less the same reliefs (See Annexure VNW-5). Further, that the application is *res judicata* as the Applicant has since filed several applications seeking similar orders both before the superior Court and subordinate Court.

14. A perfunctory review of the annexure marked VNW-5 being the cited motion filed before the lower Court reveals that the Applicant seeks among other order;-

> " 2. That the honorable Court be pleased to issue a temporary stay of execution of the ruling delivered by Hon Lucy Njora on 24th March, 2023 and all consequential orders thereto pending the hearing and determination of the Application.
>
> 3. That the honorable Court be pleased to review and vary the ruling and all consequential orders issued by the Court Hon Lucy Njora on 24th March, 2023.
>
> 4. That the honorable Court be pleased to set aside the ruling and all consequential orders issued by the Court Hon Lucy Njora on 24th March, 2023.
>
> 5. That the honorable Court be pleased to direct that the suit be set down for substantive hearing inter parties on urgent and priority basis
>
> 6. That any other relief that the Court deems fit to so order.
>
> 7 ....." (sic)

15. The Applicant eschewed filing a further affidavit to address the Respondent's contestation and it may well be that the application before the lower Court is still pending. Here it is not in dispute that the motion before this Court is seeking leave to appeal out of time and stay of execution pending the intended appeal, all in respect of the lower Court decision. The substantive reliefs that have been sought before the lower Court concern review, varying and or setting aside the decision of the lower Court of 24.03.2023. Patently, there is more the one application over the same subject matter. The instant motion before this Court despite being filed before the motion at the lower Court, equally targets the lower Court decision delivered on 24.03.2023, is in respect of the same parties, and lastly both motions are pending before Courts of competent jurisdiction.

16. Ordinarily good order would dictate that a preliminary contestation premised on the *sub judice* rule be canvassed before Court where the subsequent proceedings have been initiated. Nevertheless, here it is material to observe that the substantive reliefs sought before both courts are at variance. As earlier observed, what is before the lower Court pertains review, varying and or setting aside the decision of the lower Court meanwhile what is before this Court concerns leave to appeal out of time and stay of execution pending the intended appeal. Despite the settled position regarding the concurrent pursuit of both the reliefs of appeal and review of a decision of a Court. See;- *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* [2007] eKLR. That said, this Court while equally applying its mind to the *dicta* in *Maina Kiai & 5 Others* (*supra*), is of the view that the proceedings

herein are not an affront to either the doctrine of *sub judice* or *res judicata*. Therefore, the Respondent's contestation fails.

17. Moving on to the substance of the motion, it is evident on a plain reading of Order 42 Rule 6(1) of the *CPR*, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. Hence the invocation of the jurisdiction of this Court under Order 42 Rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the *Civil Procedure Rules*). Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the Court may be acting in vacuo by considering the Applicant's prayer for stay of execution pending a non-existent appeal. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR approved the reasoning that stay of execution pending appeal must be predicated on an existing appeal.

18. Earlier, the Court of Appeal in the case of *Equity Bank -vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -vs- Captain Francis E. K. Hinga* [2012] eKLR). Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter.

19. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that "an appeal may be admitted out of time" in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking temporary stay of execution of the ruling delivered in the lower Court suit pending hearing and determination of the substantive appeal has no legal anchor and cannot be entertained.

20. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*. Section 79G of the *Civil Procedure Act* provides that:-

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> > Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

21. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

22. While the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:-

> "The underlying principles a court should consider in exercise of such discretion include;
>
> 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
> 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
> 6. Whether the application has been brought without undue delay.
> 7. ....."
>
> See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

23. At the outset it is pertinent to note that the Applicants' affidavit is marked by a deficiency of evidence in support of the instant application. Nevertheless, the only explanation for delay in filing the instant motion advanced, is that the Applicant only came to learn of the impugned ruling and subsequent order of the lower Court, upon the latter being served on his advocate on 19.06.2023. That therebefore, he was under the mistaken belief that the matter was still pending ruling before the lower Court having been deferred severally. In furtherance of the said explanation the Applicant referred to annexure DKG-1 and DKG-3, which documents were not annexed to the affidavit in support before this Court. Therefore, the Court is at a disadvantage as to the veracity of the Applicant's assertions. The Respondent on her part takes issue with motion for inordinate and unexplained delay since.

24. Here the Court concurs with the Respondent that the manifest delay constitutes approximately six (6) months since delivery of the impugned ruling and filing of the instant motion. Further from the Applicant's own affidavit material he asserted to having known of the impugned ruling as at 19.06.2023. Yet the motion was filed close to three (3) months which delay is unexplained. Purported attempts to follow up on the matter with counsel as asserted have not been supported by evidence. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the court's discretion. Here, the period of delay is inordinate, and the Applicants affidavit material attempts no explanation for it, other than for the bland attempt to do so.

25. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR addressed itself on the question of delay as follows; -

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."

26. A motion of this nature principally stands or falls on the demonstration of "good and sufficient cause" by an applicant; it is what unlocks this Court's discretion. The Court agrees with the Respondent that the Applicant has not demonstrated "good and sufficient cause". Notably, the Applicant's counsel did not deem it necessary to swear his own affidavit in support of the explanation of mistake and or attempts made at inquiring as to the obtaining position of the lower Court suit if indeed it was pending ruling in chambers. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others*, [2015] eKLR while addressing itself to the obligation of counsel to both client and the Court made the following remarks:

> " From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side..."

27. Clearly, in these circumstances, granting the prayer for leave might only work prejudice against the Respondent and appear to condone abuse of the Court process by the Applicant through the filing of multiple applications over the same subject matter. While the Court is alive to the emphasis in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR concerning the importance of the right of appeal, the right is not absolute and must be balanced against the Respondent's corresponding right to have the dispute determined expeditiously. The prayer for leave to appeal out of time has not been justified. In the circumstances, the Court finds no merit whatsoever in the motion dated 04.09.2023. The motion is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: N/A

For the Respondent: N/A

C/A: Erick